STATE OF MICHIGAN
IN THE SUPREME COURT

MARY ANN HEGADORN, Plaintiff-Appellant, v DEPARTMENT OF HUMAN SERVICES DIRECTOR, Defendant-Appellee	SC:156132 COA: 329508 Livingston CC: 2014-028394-AA
ESTATE OF DOROTHY LOLLAR, by DEBORAH D TRIM, Personal Representative Plaintiff-Appellant, v. DEPARTMENT OF HUMAN SERVICES DIRECTOR, Defendant-Appellee	SC: 156133 COA: 329511 Livingston CC: 2014-028395-AA
ROSELYN FORD, Plaintiff-Appellant v DEPARTMENT OF HUMAN SERVICES DIRECTOR, Defendant-Appellee	SC: 156134 COA: 331242 Washtenaw CC: 15-000488-AA

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS APPELLANTS' APPLICATION FOR LEAVE TO APPEAL BY ELDER LAW AND DISABILITY RIGHTS SECTION OF THE STATE BAR OF MICHIGAN AND MICHIGAN CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

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STATEMENT OF THE BASIS OF JURISDICTION

Movant does not dispute the statements of jurisdiction of the parties.

STATEMENT OF QUESTIONS INVOLVED

Movant does not propose to introduce new matter but endeavors to assist the Court in the questions presented by the parties.

STATEMENT OF FACTS

Movant does not contest the statement of facts of the parties and adopts those in this brief.

INTRODUCTION

Movant presents this brief to support and supplement its motion. It will not restate the points made in its Motion for Leave to Participate.

Movant offers to aid the Court in navigating Title XIX of the Social Security Act, the Medicaid program, which has been described as an "Act 'almost unintelligible to the uninitiated'" and "an aggravated assault on the English language, resistant to attempts to understand it." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 n.14 (1981). As the Sixth Circuit observed "A determination of [] eligibility requires an eye-glazing examination of a labyrinthine maze of sections, and seemingly infinite subsections, of the Medicaid Act." *Douglas v. Babcock*, 990 F. 2d 875, 879 (6th Cir 1993).

In the second part of this brief Movant highlights the unprecedented power the Court of Appeals decision gives to administrative agencies. As noted in the motion that this brief supports the Solicitor General stated that the Department Appellee will use the decision as precedent. There is no reason why other administrative agencies of this state will not do the same.

ARGUMENT

I The Court of Appeals Committed Clear Error in Failing to Evaluate the Plaintiff Appellants' Trusts by the rules stated in 42 USC 1396p(d)

These cases concern interpretation of 42 USC 1396p(d), the Medicaid program provisions that are commonly referred to as the "Medicaid trust" rules. Movant does not propose to respond to the arguments of the parties but rather to comment on the distinction in treatment of trusts that the statutory scheme when an applicant is married.

When the applicant for Medicaid assistance is married the "resources," assets and income,

of both spouses must be evaluated. When either or both are trust beneficiaries, the program evaluates the trust differently depending on whether it distributes to the applicant[1] or the spouse.

In summary, trusts of the applicant are evaluated under the Medicaid trust "any circumstance" test and those of spouses are evaluated under the general resource rules.

Perhaps the fundamental error in the Court of Appeals' analysis is that it ignored the limiting language of the very first paragraph of the section, 42 USC 1396p(d)(1). It instead started its analysis at the third paragraph, 42 USC 1396p(d)(3), that states the rule concerning trusts that may distribute to the applicant under "any circumstance." The Court presumed, without any statutory analysis, that the paragraph (d)(3) rule applied to trusts that distribute solely to the applicants' spouses, even though they were not applying for benefits. The conclusion is clearly erroneous.

The plain text of paragraphs 1396p(d)(1) and (d)(3) taken together are clear that they apply to trusts that distribute to the applicant and not any other person (or individual).

A. The text of 42 USC 1396p(d)(1) is clear that it applies to individuals who are applicants for benefits.

1396p(d)(1) expressly states that the trust rules apply to individuals who are applicants for benefits:

> "For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by **such individual**."

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[1] Movant will refer to the person who applies for benefits as the "applicant." The federal statute uses the term "individual" and Department Appellee uses the term "person" in its program policy statements found in its Bridges Eligibility Manual (BEM). We hope that the use of "applicant" will lessen confusion rather than introduce yet another layer of it.

42 USC 1396p(d)(1)[2]

The rules of referenced paragraph (3) provide that if the trust may make payment to the individual applicant, under any circumstance, the entire trust corpus is an asset available to the applicant. The pertinent language is:

> In the case of an irrevocable trust –
>
> "(i) if there are **any circumstances** under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, **payment to the individual** could be made shall be considered resources available to the individual"

42 USC 1396p(d)(3)(B)(i) (emphasis added)

The referenced paragraph (4) concerns trusts that contain assets of and make payments to applicants in three classes. The rules of paragraph (3) do not apply to these trusts. 42 USC 1396p(d)(4) Subparagraph (A) concerns applicants who have assets in trusts that were established when they were disabled, under age 65 and the trusts were established by certain other persons for the applicant's benefit. These trusts are commonly known as "d(4)A) trusts." Subparagraph (B) concerns trusts that receive the applicant's income. These are commonly known as "Miller trusts." Subparagraph (C) concerns disabled applicants who have accounts in trusts established and managed by a non-profit association. The account must have been established solely for the benefit of the applicant by others including a parent, or a court. These are commonly known as pooled trusts.

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[2]The Centers for Medicare and Medicaid Services (CMS), the federal agency that administers the Medicaid program publishes the State Medicaid Manual by which it instructs states on the necessary terms their Medicaid programs. of CMS has interpreted "such individual" to mean the person who is applying for benefits.
Medicaid:

> Individuals to Whom Trust Provisions Apply.--This section applies to any individual who establishes a trust and who is an applicant for or recipient of Medicaid. []

State Medicaid Manual 3259.3
This manual is given deference in its interpretation of the statute. *Hughes v. McCarthy* 734 F. 3d 473, 481 (6th Cir 2013)

The key concept of 1396p(d) and its subsections is that it concerns trusts that make "payment to the individual" who is an applicant for benefits. The spousal trusts in issue do not make payment to the individual applicant and should not be evaluated by the rules of the section.

B. The history and structure of the program make clear that a married applicant is an individual, not a marital unit.

It may be unduly eye glazing to develop in detail here, but the history and the structure of the Medicaid program has at its foundation the concept of the individual applicant.

> Prior to enactment of the MCCA, shortly after a spouse was institutionalized, each spouse was treated as a separate household. Income, such as Social Security checks, pensions, and interest or dividends from investments, were considered to belong to the spouse whose name was on the instrument conveying the funds. Consequently, when the husband, for example, entered a nursing home and the couple's pension check had the husband's name on it, all of that income was attributed to him when determining Medicaid eligibility, leaving the wife destitute. Conversely, if the wife entered the nursing home, the husband had no obligation under federal law to contribute any of that income toward the cost of the wife's care. See H.R.Rep. No. 100-105(II), 100th Cong., 2nd Sess., at 66 (1987), reprinted in 1988 U.S.C.C.A.N. 857, 889. (Emphasis added)

Johnson v. Guhl, 91 F. Supp. 2d 754, 761 (D. New Jersey 2000). The reference to MCCA is to the Medicare Catastrophic Coverage Act of 1988.

The Medicaid program continues this separate household concept. For example, once the institutionalized spouse is determined to be eligible for benefits, "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4)[3].

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[3] The complete text 42 U.S.C. 1396r- 5(c)(4) states:
(c) Rules for treatment of resources
(4) Separate treatment of resources after eligibility for benefits established
During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

The Court of Appeals relied 42 USC 1396p(d)(2)(A)[4] for its conclusion that irrevocable trusts that make payment to the spouse of an applicant are to be tested under the "any circumstances"rule of 1396p(d)(3)(B)(i). Paragraph (d)(2)(A) has not to do with trust distributions but rather creates the presumption that the applicant "established" the trust. Eligibility is not determined by who established a trust but rather by to whom the trust makes distribution.

Without exception the entirety of 1396p(d) refers to trusts that distribute to applicants for benefits. It was clearly erroneous to use the standards of 1396p(d) to evaluate the spousal trusts.

C. Congress rejected the application of the Medicaid trust rules of 1396p(d) to spousal trusts where the spouse is not also applying for benefits.

The point established by Plaintiff-Appellants in pages 14–19 of their Application for Leave to Appeal is key to interpretation of 1396p(d). 1396p(d) does not include trusts that *distribute* to the spouse of the applicant individual. Congress rejected such a provision when it established the rules for trusts under the Supplemental Security Income program.[5]

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[4]That paragraph provides in part:

(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

[5] Congress expressly rejected such provision for "Medicaid trusts." The rules of 42 USC 1396p(d) were added to Title XIX of the Social Security Act in 1993 as part of the Omnibus Budget Reconciliation Act (OBRA 93). In 1999 Congress enacted comparable trust rules for Supplemental Security Income (SSI) recipients. However the "SSI trust" rules include trusts that distribute to the individual applicant *and the spouse*, 42 USC 1382b(e)(3)(B). Congress directed the states to not use the SSI trust standards in their Medicaid programs, unless the Medicaid recipients were also SSI recipients, by 42 USC 1396a(a)(17)(G). The state programs are directed to use the provisions of 1396p concerning the treatment of trusts, 42 USC 1396a(a)(18).

D. Spousal trusts are evaluated under the state law of trusts to determine if the spouse has available resources.

When the Department is determining the eligibility of an applicant, 42 USC 1396r-5(c)(2) requires the Department to determine the amount of "resources" available to the applicant and the spouse.[6] Spousal trusts must be evaluated for "available resources" under standards established by the federal secretary. 42 USC 1396a(a)(17)[7] *Schweiker v. Gray Panthers*, 453 US 34, 37 (1981). Under the Secretary's definition, "resources" means property that the individual applicant or spouse could convert to cash. 20 C.F.R. 416.1201(a)[8]

> (a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.
>
> (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. *If a property right cannot be liquidated, the property will not be considered a resource of the individual*

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[6] (c) Rules for treatment of resources
(2) Attribution of resources at time of initial eligibility determination
In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—
(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and
(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits)
42 USC 1396r-5(c)(2)

[7] A State plan for medical assistance must—
(17) [] include reasonable standards [] for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient [].
42 U.S. Code § 1396a(a)(17)

(or spouse). (emphasis added)

20 C.F.R. 416.1201(a).

Since there is no federal standard for evaluating the availability of resources in a spouse's trust, the determination must be made under the state law of trusts. The federal Third Circuit observed

> "[] there is no reason to believe [Congress] abrogated States' general laws of trusts [] Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues."

Lewis v. Alexander, 685 F. 3d 325, 347 (3rd Cir 2012).

In the instant cases the Court of Appeals did not make any determination of the availability of trust resources - income or assets - to the spouses. These cases involve spousal "sole benefit trusts," which trusts must satisfy the program requirements to be a transfer to a third party for the sole benefit of the spouse. This "sole benefit" standard requires the arrangement to be designed to completely distribute to the spouse or for the benefit of the spouse during his lifetime. *See Hughes v. McCarthy*, 734 F. 3d 473, 481-483 (6th Cir 2013). Plaintiff-Appellants have covered this subject and Movant will not repeat the analysis.

In summary the Department erroneously concluded that the spousal trusts were "countable" assets using the "any circumstances" distribution test. The Court of Appeals made the conclusion without any statutory analysis and in derogation to the plain text of the statute.

E. There is no need to ignore the plain text of the statute to give effect to the Congressional intent. The statutory scheme provides the state with a mechanism to seek support for the applicant by way of court order of support.

Department Appellee raises the specter that if the Court interprets the statute as written,

spouses of applicants can shelter unlimited assets. That is not correct. As detailed in the motion that this brief supports, the statutory scheme grants the state the right to seek support in the name of the applicant against his or her spouse, 42 U.S. Code § 1396r-5(c)(3).[9] In the same way the spouse may seek an order of support against the applicant, 42 U.S.C. 1396r-5(f)(3).[10] This statutory remedy resolves the problem of the community spouse having insufficient or excessive assets. The remedy of an action for spousal support, be that institutional or community spouse, takes the question of adequacy of support out of the administrative process and places it in the court system where it properly belongs.

II. The decision of the Court of Appeals grants Michigan Administrative agencies unprecedented power to change policy and practice without notice in complete disregard of its administrative policies and without any consideration to those who have substantially and justifiably relied on long standing consistently applied policy.

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[9](3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

[10] (f) Permitting transfer of resources to community spouse

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

The opinion and decision of the Court of Appeals grant administrative agencies the unlimited power to act arbitrarily merely by changing its "mistaken interpretation" of the law. There is no reason to believe that this grant of arbitrary power to an administrative agency of the state of Michigan will remain limited to the Appellee Department.

Nothing in the the record or the parties statements show an external reason for the change. There was no change in law, no court decision, no notice of program noncompliance from the federal agency CMS. While one may posit that an agency has a duty to correct a mistaken application of the law, this power is not unlimited. An agency may not act by unlawful procedure resulting in material prejudice to a party, MCL 24.306, and that is what the Department did in these cases.

On August 20, 2014 it changed, without notice, its treatment of spousal sole benefit trusts, reversing a policy that had been in effect at least 17 years and upon which these Plaintiff Appellants substantially relied. The change without notice and opportunity to comply with the new interpretation, caused Plaintiff-Appellants financial losses in the tens of thousands of dollars.

A. It is uncontested that Plaintiff-Appellants were eligible when they applied for benefits and if Department Appellee followed its written policy their applications would have been approved before the Department changed its policy.

Movant relies upon the record recited by Plaintiff-Appellants in pages 5-6 of their Application for Leave to Appeal. Mary Schrauben, the Departmental specialist, Office of Legal Services, testified in all three cases that prior to August 13, 2014, the assets of a Sole Benefit Trust such as those of Plaintiff-Appellants were non-countable. In all of these cases, it was the inclusion of the corpus of the Sole Benefit Trust that made them ineligible for benefits.

B. If the Agency followed its written policy it would have approved Appellants' applications before it changed its trust policy.

The Department's written policy requires it to certify program approval or denial within 45 days of receipt of an application.

> Certify program approval or denial of the application within 45 days. Bridges automatically generates the client notice.

Bridges Administrative Manual, (BAM) 115 p. 15 (7-1-2014)

There is no question but that if Department followed its procedures Appellants would have been approved for benefits before it changed its trust policy on August 20, 2014.

C. Movant concurs with Appellants that under controlling precedent the Department's change in policy could only apply prospectively.

Petitioner concurs with Appellants that *In re D'Amico Estate*, 435 Mich. 551, 460 N.W.2d 198, 203 (Mich. 1990) is controlling precedent. There an agency interpreted the Lottery Act consistently for over a decade as exempting prizes from the estate tax. This Court held that the administrative agency was bound by its contemporaneous construction of the statute with regard to persons who purchased lottery tickets before it changed its policy. In the same way the Department here must be held to its contemporaneous construction of the statute with regard to persons who made application before it changed its trust policy.

This Court held that the agency could not retroactively apply its new interpretation of the tax law, but rather was bound by its prior construction. The court observed:

> "It has been held that an administrative agency having interpretive authority may reverse its interpretation of a statute, but that its new interpretation applies only prospectively." Sands, supra, Sec. 49.05, p. 365"

In re D'Amico Estate, 435 Mich. 551, 460 N.W.2d 198, 203 (Mich. 1990).

The Department Appellee reversed its interpretation of law and operating policy. Its application of the new policy must be applied prospectively, that is to applications made after announcement of the new policy.

D. Retroactive application of an administrative policy is strongly disfavored where those regulated by the agency demonstrate substantial and justifiable reliance on its policy.

Appellants demonstrated a substantial and justifiable reliance on the Department's policy. They arranged their affairs and incurred nursing home expenses of $7,867 dollars per month[11].

It is settled that an administrative rule is impermissibly retroactive where the person affected shows substantial and detrimental reliance on an agency's statement of its rules. It is also settled that when an agency fails to consider the "serious reliance interests" its prior policy engendered its actions may be characterized as "arbitrary."

> There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking — the arbitrary and capricious standard being among the most notable. [] when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." 556 U.S., at 515, 129 S.Ct. 1800 (citation omitted); see also id., at 535, 129 S.Ct. 1800 (KENNEDY, J., concurring in part and concurring in judgment).

Perez v. Mortgage Bankers Ass'n, __ U.S. __, 135 S.Ct. 1199,1209 (2015)

It is an established principle of administrative law that retroactive application of a rule or

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[11]The monthly amount comes from the Department's Bridges Eligibility Manual (BEM) policy item 405. In 2014 the state average cost of care was $7,867 per month.

policy is especially erroneous when applied to persons who have substantially relied upon the agency's prior construction. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50, 87-88 (1982), (retroactivity not favored where the "retroactive application 'could produce substantial inequitable results' in individual cases"); *MetWest Inc. v. Secretary of Labor*, 560 F. 3d 506, 511 (DC Circuit 2009) (an authoritative departmental interpretation could not be changed without notice and comment where the parties showed "substantial and justifiable reliance on a well-established agency interpretation.").

Where as here an agency has consistently and clearly stated its policy, retroactively changing that which has been settled for over a decade is an arbitrary act of administrative power:

> "In this case, we might well conclude that where for fifteen years the Board considered conditional negotiation consistent with the statutory design the ill effect of the retroactive application of a new standard so far outweighs any demonstrated need for immediate application to past conduct . . . as to render the action "arbitrary."

NLRB v. Majestic Weaving Co., 355 F. 2d 854, 859-861 (2d Cir. 1966).

E. The Department claims the power to disregard the substantial reliance of those who rely on its interpretation of the law, a power that this court does not claim

In its disregard of the substantial reliance that these applicants demonstrated, the Department claims a power that even the courts do not. Where this court corrected an erroneous interpretation of law, it considered the reliance interest generated by that interpretation in deciding that the decision should operate prospectively.

> [] prospective application is appropriate here. First, we consider the purpose of the new rule set forth in this opinion: to correct an error in the interpretation of § 7 of the governmental tort liability act. Prospective application would further this purpose. Second, there has been extensive reliance on Hadfield's interpretation of § 7 of the governmental tort liability act. In addition to reliance by the courts, insurance decisions have undoubtedly been predicated

> **upon this Court's longstanding interpretation of § 7 under Hadfield: municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same. Prospective application acknowledges that reliance. (Citation omitted)**

Pohutski v. City of Allen Park, 465 Mich. 675, 641 NW 2d 219, 233 (2002)

No administrative agency can claim a power that the legislature and the judiciary do not have.

F. The Department's change in interpretation of law was not a "clarifying statement."

The Department argues that its change in the interpretation of the law was a mere clarifying statement. It was not. A clarifying statement merely restates what the law or practice has always been according to the agency. Beller v. Health and Hosp. Corp. Of Marion County, 703 F. 3d 388, 391 (2012).

Respectfully submitted,

October 27, 2017

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